Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 257

GORDON P. HAYNES AND ESSIE M. HAYNES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The issue presented is whether amounts paid to the taxpayer, Gordon P. Haynes, in continuation of his salary during sick leave, are exempt from income tax as "amounts received through * * * health insurance" under Section 22 (b) (5) of the Internal Revenue Code of 1939. The Court of Appeals held that the sick leave plan of taxpayer's employer did not constitute health insurance and that the amounts received were not exempt from tax. The taxpayers assert that this holding is in conflict with *Epmeier* v. *United States*, 199 F. 2d 508 (C. A. 7th). While there are some factual differences between the two cases, we agree that, as the court below acknowledged (Pet. 13–14), a conflict exists.

We also agree that the issue is an important one affecting many taxpayers notwithstanding changes

made by the Internal Revenue Code of 1954.[1] It is estimated that, at the present time, there are pending over 66,000 claims for refund, involving more than $6,620,000, which raise this issue under the 1939 Code. Cases have already arisen in every judicial circuit except the District of Columbia Circuit and the First Circuit.[2] Accordingly, although we believe that the

[1] Section 105 (d) of the Internal Revenue Code of 1954 excludes from gross income amounts received by an employee from his employer, in lieu of wages, for a period during which the employee is absent from work on account of personal injuries or sickness. The exclusion, however, is not applicable to the extent that such amounts exceed a weekly rate of $100 or to amounts attributable to the first seven days of the absence, unless the employee is hospitalized for at least one day during that period.

[2] In addition to the instant case and the *Epmeier* case, *Moholy* v. *United States* (C. A. 9th), decided June 23, 1956 (1956 C. C. H., par. 9745), adopting the Government's position, is the only other case which has been decided by a Court of Appeals. Cases decided by lower courts are as follows:

For the Government:

Cary v. *United States* (D. Neb.), decided April 5, 1956 (1956 C. C. H., par. 9544);

Branham v. *United States*, 136 F. Supp. 342 (W. D. Ky.) (on appeal C. A. 6th, argued June 13, 1956);

Hanna v. *United States* (N. D. Tex.), decided May 25, 1956 (1956 C. C. H., par. 9736) (on appeal C. A. 5th);

Gamble v. *United States* (S. D. Tex.), decided June 4, 1956 (1956 C. C. H., par. 9666);

Oliva v. *Commissioner*, 25 T. C. No. 153 (venue on appeal would lie in C. A. 3d);

McQueen v. *Commissioner*, decided June 19, 1956 (1956 P-H T. C. Memorandum Decisions Service, par. 56,143) (venue on appeal would lie in C. A. 8th);

Townsend, Admr. v. *United States* (S. D. Ill.), decided July 23, 1956;

decision below is correct and the conflicting *Epmeier* decision is erroneous, the Government does not oppose the issuance of a writ of certiorari in this case.

Respectfully submitted.

OSCAR H. DAVIS,
Acting Solicitor General.

AUGUST 1956.

For the taxpayer:

Adams v. *Pitts* (E. D. S. C.), decided April 25, 1956 (1956 C. C. H., par. 9660) (on appeal C. A. 4th);

Herbkersman v. *United States*, 133 F. Supp. 495 (S. D. Ohio) (on appeal C. A. 6th, argued June 13, 1956);

Priebe v. *United States* (D. Ariz.), decided April 9, 1956 (1956 C. C. H., par. 9478) (on appeal C. A. 9th);

Tinsley v. *United States* (W. D. Okla.), decided March 27, 1956 (1956 C. C. H., par. 9604) (on appeal C. A. 10th).

Other cases are also pending in the Court of Claims and District Courts in the Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Circuits.